

Submission to the Journal of Media Law

Title: 'Empirical insights into corporate defamation:
An analysis of cases decided 2004-2013.'

Author: David J Acheson, University of Portsmouth.

52 Stansted Road

Southsea

PO5 1SA

Tel: 07860650325

Email: david.acheson@port.ac.uk

This research has been funded by a scholarship from the Portsmouth Business School,
University of Portsmouth.

I have no conflicts of interest to declare.

This manuscript is the author's own work, is not being considered for publication elsewhere,
and does not constitute a substantial repetition of work published or to be published
elsewhere.

Empirical insights into corporate defamation: An analysis of cases decided 2004-2013.

David J Acheson*

Abstract

This paper presents the results of a systematic analysis of all judgments handed down by the High Court, Court of Appeal, and House of Lords in defamation claims brought by corporate claimants between 2004 and 2013. The intention is to widen the range of methods with which to assess both common arguments for reforming corporate defamation law, and the ‘serious financial loss’ requirement imposed on most corporate claimants by s 1(2) of the Defamation Act 2013.

The results of the study add weight to some of the arguments put forward in support of the removal of the corporate right to sue. The research also highlights the difficulty of finding a principled and effective distinction between different kinds of corporate claimant. It suggests that this exercise may be both impossible and counter-productive, and recommends that all non-human claimants should be treated in the same way.

Keywords

Defamation; companies; financial loss; abuse of process; systematic analysis.

* University of Portsmouth, UK. All websites accessed 26 February 2016. A list of the cases studied is included at the end of the paper. To minimise footnotes, references to cases in the data set are set out as follows: ‘Case 16’ refers to all judgments in the case numbered 16 in that list; ‘Case 16b’ refers specifically to the judgment marked (b) in Case 16. This research was funded by a scholarship from the Portsmouth Business School, University of Portsmouth. Thanks to Damian Carney, Lisa Wheeler, Greg Osborne, Eric Barendt and Judith Townend for their comments on draft versions.

Introduction

After a long process of consultation, the Defamation Act 2013 ('the 2013 Act') implemented a wide range of reforms to the tort of defamation. Among the most significant of these reforms was the introduction, in section 1(2), of a requirement to demonstrate 'serious financial loss', which applies to for-profit companies suing in libel or slander. Section 1 reads as follows:

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

Although this was a substantial change in the law, overturning the long-standing rule that proof of actual damage was not required of corporate defamation claimants,¹ it did not go as far as some reform campaigners recommended. Several groups and experts argued for the complete removal of the right to sue from some or all companies.² Parliament decided against taking this approach, and in fact the 2013 Act places the corporate right to sue on a statutory footing for the first time.³

Throughout the reform debate, certain key themes recurred in discussions of the suitable approach to take to corporate defamation claimants. Those advocating reform often suggested that the risk of claimants abusing libel laws to stifle criticism was particularly pronounced with respect to corporate claimants. Other common arguments included that corporations had

¹ *South Hetton Coal Company Ltd v North-Eastern News Association Ltd* [1893] 1 QB 133 (CA) 138.

² Index on Censorship and English PEN, 'Free Speech is Not for Sale' (2009) 10 ('FSINFS'); David Howarth, 'Libel: Its Purpose and Reform' (2011) 74(6) *Modern Law Review* 845, 873-5.

³ See *Jameel v Wall Street Journal Europe SPRL* [2007] UKHL 44 ('*Jameel v WSJ*') [152] (Baroness Hale): the proposition that 'a company is in the same position as an individual' when making a claim in defamation was capable of being overruled by the House of Lords. Before the 2013 Act, the same could have been said of the existence of the corporate right to sue.

alternative means of redress available to them; that there was frequently an ‘inequality of arms’ between wealthy corporate claimants and impecunious defendants; and that claims were too frequently brought, or succeeded too often, where the statements complained of were unlikely to result in financial loss. However, few of these arguments (or the claims of those refuting them) were based on more than anecdotal evidence. As Alastair Mullis and Andrew Scott noted at the time, ‘specific proposals [were] often based either on a dearth of evidence or a partial representation of the existing law.’⁴

The ‘serious financial loss’ rule in section 1(2) was just one of a range of options available to Parliament that might have addressed complaints about corporate defamation law. Other suggestions included an Australian-style removal of the right to sue;⁵ the introduction of a permission stage for corporate claimants;⁶ and a requirement on those claimants to prove falsity.⁷

The Government, however, maintained throughout the Parliamentary debates its original stance that a ‘separate provision specifically relating to corporations’ would be both unnecessary and potentially problematic.⁸ It was only at the last minute that the Government-sponsored Amendment 2B, which would go on to become sub-section 1(2) of the 2013 Act, was introduced into the House of Lords.⁹

⁴ Alastair Mullis and Andrew Scott, ‘Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation’ (2009) 6 *Communications Law* 173, 173.

⁵ FSINFS (n 2) 10. The Australian provisions are: Civil Law (Wrongs) Act 2002 (Australian Capital Territory) s 121; Defamation Act 2006 (Northern Territory) s 8; Defamation Act 2005 (New South Wales) s 9; Defamation Act 2005 (Queensland) s 9; Defamation Act 2005 (South Australia) s 9; Defamation Act 2005 (Tasmania) s 9; Defamation Act 2005 (Victoria) s 9; Defamation Act 2005 (Western Australia) s 9.

⁶ Defamation HL Bill (2010-12) 003, cl 11.

⁷ Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* (HC 2009-10, 362-I) para 178 (‘CMS Committee Report’).

⁸ Ministry of Justice, *The Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012) para 91 (‘Government Response to Joint Committee’); HC Deb 16 April 2013, vol 561, col 269 (Helen Grant MP). See also Ministry of Justice, *Draft Defamation Bill: Consultation* (CP3/11, 2011) paras 143 and 145 (‘MoJ Consultation’).

⁹ HL Deb 23 April 2013, vol 744, col 1365 (‘HL Deb’).

Because of the late inclusion of the provision into the Bill, a number of questions about it went unanswered in the House of Lords. In particular, the concerns of Lord Faulks about the nature of the evidential requirement on corporate claimants were not addressed by Lord McNally, the Bill's sponsor.¹⁰ The Government's position of opposition to a provision specific to corporate claimants prevented Parliament from effectively scrutinising section 1(2) or sufficiently considering all of the alternative options.

In summary, the 'serious financial loss' requirement was a significant change in the law that put a large group of potential claimants at a disadvantage – but one that was based largely on anecdotal evidence, and that arguably was not subject to sufficient debate in Parliament. My broad purpose in this paper is to begin to redress the first of these problems. I seek to test both the claims made by advocates of reform or their opponents, and the appropriateness of the reform eventually adopted by Parliament in the Defamation Act 2013. I do so through a systematic analysis of the courts' approach to corporate defamation claims over the decade preceding the 2013 Act. The justification for taking this approach is my subject in the next section.

Justification

Although academic literature on English defamation law tends to be doctrinal in nature (with a considerable amount of additional literature provided by practitioners¹¹), there are now also a significant number of empirical analyses of the area.¹² These empirical analyses, however, focus primarily on studying the extra-legal 'chilling effect', whereby legitimate speech is

¹⁰ *Ibid*, col 1375.

¹¹ Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 *Current Legal Problems* 110, 110.

¹² Examples include Eric Barendt and others, *Libel and the Media: The Chilling Effect* (Clarendon Press, 1st edn 1997); Russell L Weaver and others, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 1st edn 2006); Andrew T Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 1st edn 2006); Judith Townend, 'Online Chilling Effects in England and Wales' (2014) 3(2) *Internet Policy Review*.

deterred by libel laws aimed at remedying the harm caused by illegitimate speech.¹³ To date, no systematic examination of the kind presented here – of libel law as applied by courts – has been performed in the UK.

This kind of methodology has, however, been applied to US defamation law in the past, revealing a ‘pervasive division’ in outcomes between cases involving media and non-media defendants.¹⁴ A further example – more relevant to English law – is provided by Dan Kozlowski’s systematic analysis of the European Court of Human Rights’ jurisprudence on Article 10(2) of the Convention as it relates to defamation laws.¹⁵ Kozlowski notes that ‘legal scholars who have studied the court’s defamation jurisprudence have focused primarily on a handful of the court’s noteworthy cases’,¹⁶ an observation that could fairly be extended to domestic treatment of defamation case law. Kay Levine has, in the US, noted that the ‘paradigm’ of traditional legal scholarship operates by ‘drawing conclusions about the law from a handful of select cases’.¹⁷ This is not necessarily problematic – doctrinal legal scholarship has produced much of value through this approach. Nonetheless, Levine argues that ‘the conventional legal scholar using this approach is sure to miss all kinds of interesting patterns and data that lurk beneath the surface of the chosen opinions.’¹⁸

¹³ Frederick Schauer, ‘Fear, Risk and the First Amendment: Unraveling the Chilling Effect’ (1978) 58 *Boston University Law Review* 685, 693.

¹⁴ Marc A Franklin, ‘Winners and Losers and Why: A Study of Defamation Litigation’ (1980) 5(3) *American Bar Foundation Research Journal* 455, 497. The study was extended in Marc A Franklin, ‘Suing Media for Libel: A Litigation Study’ (1981) 6(3) *American Bar Foundation Research Journal* 795. See Randall P Bezanson, Gilbert Cranberg and John Soloski, *Libel Law and the Press: Myth and Reality* (Macmillan, 1st edn 1987) 238: ‘prior to Franklin’s studies there had been no systematically obtained data about the outcome of libel cases’.

¹⁵ Dan Kozlowski, “‘For the Protection of the Reputation or Rights of Others’: The European Court of Human Rights’ Interpretation of the Defamation Exception in Article 10(2)’ (2006) 11 *Communications Law and Policy* 133.

¹⁶ *Ibid*, 136.

¹⁷ Kay L Levine, ‘The Law is not the Case: Incorporating Empirical Methods into the Culture of Case Analysis’ (2006) 17 *University of Florida Journal of Law & Public Policy* 283, 284.

¹⁸ *Ibid*, 286.

Mark Hall and Ronald Wright, in assessing US-based empirical legal literature, suggest that the systematic analysis of judgments ‘can augment conventional analysis by identifying previously unnoticed patterns that warrant deeper study,’¹⁹ and ‘offers distinctive insights that complement the types of understanding that only traditional analysis can generate.’²⁰

A concrete example of the kind of contribution that an analysis of judgments might make to existing literature may help. The subject of corporate claimants’ abuse of libel law has been studied from a variety of perspectives. Literature that draws conclusions from a small number of high profile cases can both contribute to developing a theoretical framework through which to view the issue, and demonstrate that a problem exists, at least in extreme cases.²¹ Empirical research focused on surveying or interviewing journalists or practitioners can investigate the nature and extent of the effect that cases like these have on journalistic practices.²² Comparative analysis of the content of newspapers, although focused on jurisdictions other than England, suggests that the chilling effect of abusive lawsuits and threats to sue may be more pronounced with respect to reporting on corporations.²³ Combined, this research paints a picture – albeit an incomplete one – of the negative effect that corporate misuse of defamation law has on the quality of public debate. But by systematically analysing the extent to which this problem extends into the courts, and how the existing options open to the courts are used to deal with it, we may get a better idea of what kind of reform, if any, would address the issue most appropriately.²⁴

¹⁹ Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96 *California Law Review* 63, 87.

²⁰ *Ibid*, 66.

²¹ eg Fiona Donson, ‘Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs’ (2010) 19(1) *Review of European Community and International Environmental Law* 83, drawing on *McDonalds Corp v Steel* [1997] EWHC 366 (QB) and *British Chiropractic Association v Singh* [2010] EWCA Civ 350.

²² eg Barendt and others, *Libel and the Media* (n 12).

²³ Chris Dent and Andrew T Kenyon, ‘Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers’ (2004) 9 *Media & Arts Law Review* 89.

²⁴ This subject is considered below: text to notes 79-147.

Methodology

Purpose

As noted above, the broad aims of this paper are to test some of the claims made by commentators during the reform process; and to assess the appropriateness of section 1(2) of the Defamation Act 2013, as compared to alternative options, by reference to the landscape of litigation to which Parliament was reacting. With that in mind, the topics that are investigated in most detail are:

- the courts' approach to 'abusive' or 'trivial' claims, and their use of the power to strike out claims;
- the pleading of financial loss and the courts' treatment thereof;
- the existence of alternative means of redress for corporate claimants; and
- potential means of differentiating between types of corporate claimant that should or should not be subject to any proposed reform.

However, I was conscious that to unnecessarily restrict my analysis to those areas might cause me to miss important information. It was considered a good idea to be alert to the possible existence of 'interesting patterns and data that lurk beneath the surface'.²⁵ Some assorted observations that result from this broader analysis are noted towards the end of the paper.²⁶

Procedure

The data used to conduct this analysis consisted of all available judgments handed down between 2004 and 2013 by the High Court, Court of Appeal or House of Lords²⁷ in defamation

²⁵ Levine (n 17) 286.

²⁶ Text to notes 237-55.

²⁷ The Supreme Court has not yet handed down a judgment in a defamation case involving a corporate claimant.

claims brought by non-human legal persons. ‘Non-human legal persons’ means all claimants that are not human beings, and therefore includes corporations and firms.²⁸

It would be dishonest to suggest that the ten-year time frame was initially chosen for any reason other than ten being a round number. Nevertheless, the choice has advantages. Firstly, it allows time for the courts, and parties to litigation, to have adjusted to the coming into force of the Human Rights Act 1998 and the Civil Procedure Rules.²⁹ Secondly, the High Court began publishing its judgments under neutral citations in 2002, meaning that (in theory³⁰) all relevant judgments should be available throughout the period studied. Although the judgments toward the latter end of the period could not have been relied upon during the reform process, they are still capable of revealing the practice of the courts under the libel regime that existed before the 2013 Act: the courts’ application of the law in 2013 was, at least ostensibly, unaffected by the passage of the Act.³¹

The publication of judgments under neutral citations has another advantage, in that it alleviates the problem, noted by Franklin for example, of reported cases being given extra weight.³² In order to prevent this effect from creeping back in to the analysis, material in the headnotes of reported cases was not used in the analysis.

To generate the data set, I conducted searches on both Westlaw and Lexis for judgments with either ‘defamation’, ‘slander’ or ‘libel’ in the keywords or headnote. Judgments were collected for all cases in which one or more of the claimants was non-human, and in which one or more of those claimants sued either in libel or slander, or in both. *Ascension Securities Ltd v Motley*

²⁸ Also included is a failed attempt to sue by an unincorporated trust: Case 43.

²⁹ In October 2000 and April 1999 respectively.

³⁰ See text to notes 40-52.

³¹ As a result of the Defamation Act 2013, s 16, sub-ss (4)-(7). See Case 37a [41]-[42].

³² Franklin, ‘Winners and Losers’ (n 14) 461.

Fool Ltd was also included: although no cause of action was identified by the claimant, the judge in that case ruled that the applicable law ‘must be’ libel.³³

Although the date range for inclusion in the survey was 1 January 2004 to 31 December 2013, all judgments were collected from each claim with any judgment falling within that period (for example, the judgment in *Ontulmus v Collett* dated December 2014³⁴ was included because there had been a previous judgment in the same case in April 2013³⁵). Additional judgments referred to in the existing judgments but not listed on the databases were also included where available, mainly found through Google searches.³⁶

All available judgments in each case were considered for inclusion, but were rejected if they related only to a separate cause of action,³⁷ or if the non-human claimant had left the litigation before the judgment was delivered.³⁸

The final data set consisted of 89 judgments handed down in 54 claims. Because several claims were pursued by more than one corporate claimant, there were 62 claimants in total. More detail is given on the data set below.³⁹ Each of the judgments was coded on topics relevant to the research questions, and this along with other information was recorded on a spreadsheet to be analysed.

Limitations

The most obvious limitation to the method used here is that it only investigates a small subcategory of defamation claims; namely, those that progress to the point of being the subject

³³ Case 5 [5] (Collins J).

³⁴ Case 44c.

³⁵ Case 44a.

³⁶ eg Case 49a; Case 41a (substantially redacted).

³⁷ eg *Pritchard Englefield v Steinberg* [2005] EWHC 953 (Ch).

³⁸ eg *Jameel v Times Newspapers Ltd (Pre-Trial Review)* [2005] EWHC 1219 (QB).

³⁹ Text to notes 55-78.

of a court's judgment.⁴⁰ Therefore, the claims studied are not necessarily representative of any broader population. However, the study of judgments is both interesting and valuable in itself. The observations made can supplement existing research – both the doctrinal or theoretical research that reflects in greater depth on important concepts in the law, and the empirical research that studies the effects of the law outside the courts – and thereby contribute to a more accurate picture of the law in operation.

Potentially relevant material that does not form part of the data set includes: the judgments of courts other than the High Court, Court of Appeal or House of Lords;⁴¹ decisions relating to applications for permission to appeal;⁴² ex tempore judgments of the High Court;⁴³ the decisions of Masters in the High Court;⁴⁴ statements in open court;⁴⁵ and claims filed in the High Court but not heard. Each of these sets of data is excluded because of inconsistent availability, and the latter two because, even where available, they reveal no information about the judicial treatment of the claims. Some judgments were unavailable because they had not been transcribed,⁴⁶ had been made private,⁴⁷ or had been destroyed.⁴⁸

Serious issues with the availability of statistics on defamation litigation have been noted by a Parliamentary committee,⁴⁹ the Ministry of Justice,⁵⁰ and by academics.⁵¹ No systematic

⁴⁰ Kenyon, *Defamation* (n 12) 107. See also Barendt and others, *Libel and the Media* (n 12) 40: '...only a small proportion of libel writs lead to the case being set down for trial, let alone to a trial itself.'

⁴¹ Claims filed in district registries, of which no central records are kept, were therefore not included: eg *Seafresh Ltd v Shaw*: <www.onebrickcourt.com/barristers.aspx?menu=main&pageid=25&barristerid=34>.

⁴² eg *McGrath v Dawkins* [2013] EWCA Civ 206.

⁴³ eg the striking out of the defamation claim in *Tesla Motors Ltd v BBC* [2011] EWHC 2760 (QB).

⁴⁴ eg *RFS Capital LLC v MD7 Europe* (QB, 6 October 2009) <www.5rb.com/case/rfs-capital-llc-rfs-capital-bv-v-md7-europe-michael-gianni>.

⁴⁵ eg *Medicolegal Investigations Ltd v Sharma* (Statement in Open Court, 18 July 2007).

⁴⁶ eg the full text of the judgment in Case 3. Transcription costs were beyond the budget for this research.

⁴⁷ eg the order of Sharp J referred to at [10] in Case 14.

⁴⁸ eg the judgment of Elias J against which an appeal was heard in Case 20a. That this document had been destroyed was confirmed by an email from the Queen's Bench Action Department to the author (4 April 2016).

⁴⁹ CMS Committee Report (n 7) paras 207-8.

⁵⁰ Ministry of Justice, *Report of the Libel Working Group* (23 March 2010) para 8; MoJ Consultation (n 8) Annex E: Impact Assessment, paras 2.14-23.

⁵¹ Judith Townend, 'Closed Data: Defamation and Privacy Disputes in England and Wales' (2013) 5(1) *Journal of Media Law* 31; Kenyon, *Defamation* (n 12) 107.

collection of statistics is undertaken by the High Court, and, until March 2014, claim forms were not filed by reference to the cause of action, meaning that it would be costly and time-consuming for a researcher to identify all claims of a certain type filed with the court, especially considering that records are not digitised. Judith Townend has described the records of the Court as comparable to information ‘stored in a public filing cabinet with no drawer handles or labels.’⁵² I would only add that the Court considers it appropriate to charge ten pounds for the privilege of accessing that cabinet for quarter of an hour.

The Impact Assessment for the Defamation Bill, produced by the Ministry of Justice (‘MoJ’), estimated that 44 defamation claims were filed at the High Court by businesses between 1 October 2009 and 7 November 2011.⁵³ Of the 54 claims analysed here, between 10 and 13 were filed in this period.⁵⁴ The same approximate ratio holds if the MoJ’s figures are extrapolated out to ten years – just over 200 claims filed in that period are represented by 54 in my data set. It would seem likely, therefore, that the claims analysed here represent roughly one quarter of all corporate claims filed in the High Court over the period studied. The remainder, presumably, will have been settled or discontinued before trial.

The sample size is not sufficient for any meaningful quantitative analysis to be carried out on the data. For that reason, only descriptive statistics (ie one in ten, or ten per cent) are used here.

⁵² Townend, ‘Closed Data’ (n 51) 32.

⁵³ MoJ Consultation (n 8) Annex E: Impact Assessment, para 2.61.

⁵⁴ A precise date is not available for Cases 29, 42 or 53, but the dates of the judgments would suggest that it is likely that at least one of these claims was also filed in the period in question.

Results and discussion

General observations

As noted above, the final data set consisted of 89 judgments relating to 54 claims brought by a total of 62 non-human claimants. Fifteen of those judgments were delivered by the Court of Appeal, and one by the House of Lords. The remainder, 73, were decisions of the High Court.

The majority of claims were brought by only one corporate claimant: eight claims were brought by two companies simultaneously, and one by three companies.⁵⁵ Only two companies – Las Vegas Sands Corp⁵⁶ and Gentoo Group Ltd⁵⁷ – brought separate claims against different defendants during the period studied.

A wide variety of companies sued in defamation over this period. Thirteen were publicly-traded, and a significant number of the privately-owned companies in the data set were part of a larger corporate group. However, claims were also brought by substantially smaller companies. Five of the 62 claimants could be described as not-for-profit organisations.⁵⁸ A range of industries were also represented – from firms of solicitors⁵⁹ to casino operators,⁶⁰ construction companies,⁶¹ and retailers.⁶²

Almost half (24) of the claims were brought against human defendants only, while the remainder were split fairly evenly between those brought only against companies (13) and those brought against both humans and companies (17). Corporate defendants tended to be either competitors of the claimant or, less often, media companies; human defendants were

⁵⁵ Case 9.

⁵⁶ Case 1; Case 2.

⁵⁷ Case 24; Case 49. Sunderland Housing Co Ltd is the former name of Gentoo Group Ltd.

⁵⁸ Case 10; Case 21; Cases 24 and 49; Case 34 (1st claimant); Case 43.

⁵⁹ eg Case 7; Case 34 (2nd claimant); Case 46.

⁶⁰ eg Case 1; Case 2; Case 6.

⁶¹ eg Case 8.

⁶² eg Case 50.

more varied, although a substantial number were employees or ex-employees either of the claimant or of a corporate defendant.

Interestingly, around half of all the claims studied were brought with respect to internet publications only, and only three claimants that obtained judgment in their favour sued in respect of physical publications only.⁶³ Perhaps this is not particularly surprising, but it lends support to the perception that internet-based publications are increasingly becoming the norm in defamation actions.⁶⁴ The facts of cases such as *Islam Expo Ltd v Spectator (1828) Ltd* (on whether hyperlinked content could be considered part of the context of the words complained of⁶⁵) and *Sheffield Wednesday Football Club Ltd v Hargreaves* (a *Norwich Pharmacal* application⁶⁶ related to pseudonymous website contributors⁶⁷) would have been entirely unforeseeable two decades ago.

The outcomes of the cases studied are not necessarily easy to measure. As Hall and Wright note, ‘Defining what counts as a win or loss across a range of cases is not a simple matter.’⁶⁸ Twelve of the claims (just over a fifth) resulted in judgment being entered for the claimant, but two things should be noted about this figure. Firstly, three of these claims were brought against the same defendant, Rick Kordowski, in the long-running ‘Solicitors from Hell’ litigation.⁶⁹ Secondly, in one of those claims, only one of the two corporate claimants successfully relied on the cause of action in defamation.⁷⁰ In a further two claims, the claimant obtained judgment against only one of three defendants.⁷¹

⁶³ Case 33; Case 20 (both in respect of letters); Case 17 (signs displayed on defendants’ properties).

⁶⁴ Jenny Afia and Phil Hartley, ‘Lord Lester’s Draft Defamation Bill 2010: A Practical Analysis’ (2010) 2(2) *Journal of Media Law* 183, 191.

⁶⁵ Case 29.

⁶⁶ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

⁶⁷ Case 48.

⁶⁸ Hall and Wright (n 19) 108.

⁶⁹ Cases 7, 34 and 46.

⁷⁰ Case 34.

⁷¹ Case 16; Case 40.

At least eight claimants settled their claims, with the largest reported settlement being the £300,000 (plus over £2m in costs) paid to Collins Stewart Ltd by the Financial Times.⁷²

Thirteen of the claims were struck out by the court.⁷³ One claimant failed to convince the court to disapply the limitation period in order that a claim could be brought;⁷⁴ and one failed to obtain an injunction before publication.⁷⁵ One claimant lost at trial;⁷⁶ and the only finding of liability made by a jury was eventually overturned on appeal.⁷⁷ In addition, at least three claimants abandoned their claims.⁷⁸

The following four sections will focus on the findings of the analysis in relation to the main research questions studied. Some assorted observations on the data are then made before the paper's conclusion.

'Abusive' or 'trivial' lawsuits

Although noted already, it should be reiterated that the extent to which a study of court judgments can investigate the problem of abusive lawsuits, and the chilling effect that they cause, is limited. As Mullis and Scott point out, 'The problem with libel has always been and remains the harm caused by threats and bullying in the shadow of the law',⁷⁹ which, by their nature, cannot be studied here. The clearest demonstration of this limitation is the fact that high-profile claims such as *NMT v Wilmshurst*, brought by a US-based pharmaceutical company, do not appear in the data set. Although it was never the subject of a High Court

⁷² Russell Hotten, 'FT Agrees Huge Payout as Middleweek Case is Finally Settled' *Daily Telegraph* (18 Jan 2006) <www.telegraph.co.uk/finance/markets/2930366/FT-agrees-huge-payout-as-Middleweek-case-is-finally-settled.html>.

⁷³ In addition, the claim in Case 40a was struck out against two out of three claimants. In Case 11, the claimant was able to extract settlements from two defendants before the action was struck out against the third.

⁷⁴ Case 25.

⁷⁵ Case 9.

⁷⁶ Case 6.

⁷⁷ Case 31g.

⁷⁸ Case 5; Case 10; Case 42.

⁷⁹ Alastair Mullis and Andrew Scott, 'The Defamation Bill 2012: Missing the Wood (With No Excuses)' (*Inform*, 6 June 2012) <inform.wordpress.com/2012/06/06/the-defamation-bill-2012-missing-the-wood-with-no-excuses-alastair-mullis-and-andrew-scott/>.

judgment, defendant Peter Wilmhurst reported that he spent £300,000 and four years defending the claim.⁸⁰ Concern was expressed about this case, and others like it, by the House of Commons Culture, Media and Sport Committee ('CMS Committee'),⁸¹ the Joint Committee on the Draft Defamation Bill,⁸² and, more recently, the Northern Ireland Law Commission.⁸³ Wilmhurst's case was considered to be illustrative of the chilling effect of corporate defamation claims on scientific discourse,⁸⁴ and was described as a 'cause célèbre' of the reform movement by Lord McNally in the House of Lords.⁸⁵

Despite this problem, the data gathered here can give some important insights into the issue of trivial or abusive lawsuits, by contributing to a greater understanding of whether and to what extent these claims find their way into the courts, and of how the courts deal with them when they do.

Advocates of reform were occasionally criticised for relying on anecdotal evidence of abusive or trivial lawsuits to support their arguments for restricting the corporate right to sue. For example, the suggestion by the CMS Committee that corporate defamation law 'has already led to a stifling effect on freedom of expression'⁸⁶ was considered by Magnus Boyd to have been 'drawn from only two cases over the last eleven years'.⁸⁷ The criticism undoubtedly has merit. The reliance on insubstantial evidence might be epitomised by a comment made by Paul Farrelly MP, a member of the Committee, during the gathering of evidence. Farrelly stated that 'many of the actions taken by large corporations in particular are not primarily about money',

⁸⁰ HL Deb (n 9) col 1371.

⁸¹ CMS Committee Report (n 7) para 141.

⁸² Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-1) para 47 ('Joint Committee Report').

⁸³ Northern Ireland Law Commission, *Defamation Law in Northern Ireland* (NILC 19, 2014) para 1.10.

⁸⁴ eg Simon Singh, 'The Libel Minefield' (2010) 57(4) *The Biologist* 190, 191.

⁸⁵ HL Deb (n 9) col 1380.

⁸⁶ CMS Committee Report (n 7) para 177.

⁸⁷ Magnus Boyd, 'The Proposed Restriction on Corporate Bodies to Sue for Defamation' (Reframing Libel Symposium, London, 4 November 2010) <<http://reframinglibel.com/2011/03/17/the-proposed-restriction-on-corporate-bodies-to-sue-for-defamation/>>. The two cases referred to are *McDonalds Corp v Steel* [1997] EWHC 366 (QB) and *Tesco Stores Ltd v Guardian News & Media Ltd* [2009] EMLR 5.

and in support of this assertion cited two cases ‘where the avowed intention of the litigant was to drive the publisher out of business’⁸⁸ – *Goldsmith v Pressdram*⁸⁹ and *Aitken v Guardian News & Media*⁹⁰ – only one of which (the former) involved a corporate claimant.

Valid though this criticism may be, the evidence relied on by those claiming that the problem was being exaggerated was no less anecdotal. Boyd, for example, after criticising the CMS Committee’s reliance on anecdotal evidence, stated that the ‘vast majority of corporate claimants’ have legitimate cases, and that it was ‘abundantly clear that the *McLibel* case was atypical’ without citing any further evidence.⁹¹

Both sides of this debate, then, relied on little more than bare assertions to support their respective cases. Despite this, the Government’s stated intention in introducing the ‘serious harm’ test, and by extension the ‘serious financial loss’ aspect of that test applicable to corporate claimants, was to ‘remove the scope for trivial and unfounded actions succeeding’,⁹² which seems to accept without question that there was such a scope in the first place. The systematic analysis undertaken here can plausibly contribute to a more rigorous evidential base on which to judge these arguments.

It is worth noting here that the issue of abusive or trivial claims is often linked in the reform literature to concern about ‘inequality of arms’,⁹³ an issue which is taken up in greater detail in the section below on ‘Categorising corporate claimants’.⁹⁴ At this point it is sufficient to say

⁸⁸ Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Oral and Written Evidence* (HC 2009-10, 362-II) Ev 15, Q17 (‘CMS Evidence’).

⁸⁹ [1988] 1 WLR 64.

⁹⁰ [1997] EMLR 415.

⁹¹ Boyd (n 87).

⁹² MoJ Consultation (n 8) para 4. It is difficult to determine the rationale behind sub-s (2) specifically, given its late inclusion into the Bill. The specific focus on *financial* loss probably reflects the perception that corporations are unable to suffer other kinds of loss: Joint Committee Report (n 82) para 110. The pleading of financial loss is considered below, at text to notes 185-208.

⁹³ Joint Committee Report (n 82) para 109; Government Response to Joint Committee (n 8) para 90.

⁹⁴ Text to notes 209-36.

that in practice it may be extremely difficult to differentiate between claimants whose wealth gives them the capacity to stifle speech and those who have more limited resources.

The most important finding of this analysis in relation to abusive or trivial defamation claims is the simple observation that a worryingly large proportion of the corporate claims studied were criticised in some way by the courts. Of the 54 claims, 21 were the subject of some kind of judicial criticism.⁹⁵

In relation to the issue of abusive claims, cases were coded into one of six categories,⁹⁶ as follows:

1. No mention of abuse or criticism of the claimant in the judgment(s).
2. Claim was declared by the judge to be ‘abusive’, ‘vexatious’ or similar.
3. Judge criticised the claimant’s conduct or questioned its motive.
4. The claim itself, or part of the claim, was criticised as being weak or improperly pleaded.
5. Judge specifically noted that the claim, or the claimant’s conduct, was legitimate (ie motivated by a desire to vindicate reputation) or not abusive.
6. Other – unable to categorise.

Only two claims fell into the ‘Other’ category. The first was *Pritchard Englefield v Steinberg*,⁹⁷ which was considered to be too difficult to categorise. The Court of Appeal, when it heard the case for the first time in 2005, investigated the basis of the claim in order to ‘ensure that its process [was] not being misused’,⁹⁸ and found that it ‘was a long way from the situation found

⁹⁵ Even noting the lack of comparative statistics, in any area of litigation nearly 40% of claims being criticised would be considered a significant problem.

⁹⁶ Each case was placed into only one category. Where cases might have fallen into more than one category, the decision of higher courts was given more weight. Where they fell into more than one of the ‘abusive’ categories (2, 3 or 4) they were placed in the more serious of those.

⁹⁷ Case 45.

⁹⁸ Case 45a [20].

in *Jameel [v Dow Jones]*.⁹⁹ This suggests that the Court was satisfied that the use of litigation was not disproportionate to the scope of publication, but the decision was considered to be too vague to warrant inclusion in category five, because the Court did not specifically make reference to the claimants' motivation. The difficulty of categorising this case is added to by the High Court's suggestion in 2011 that '[h]ad the Court of Appeal's later decision in *Jameel* ... been available in 2003, an argument might well have been raised of abuse of process. Whether it would have succeeded cannot now be determined.'¹⁰⁰ The second claim in the 'Other' category was *North London Central Mosque Trust v Policy Exchange*,¹⁰¹ the interpretation of which is complicated by the fact that the intended claimant charity was not recognised as having legal personality. Eady J made reference to the failure of the trustees, who had sought to sue on behalf of the charity once its lack of standing had been recognised, to establish in advance that using charitable funds for the litigation would be reasonable.¹⁰² This, technically, was not a criticism of a corporate claimant, since none existed. It was also thought too vague to warrant inclusion in any other category.

Claims that were struck out as an abuse of process were not automatically added to the second category. As explained by Tugendhat J in *Hays Plc v Hartley*, '[t]he word "abuse" has a special meaning in the law and implies no subjective wrongful state of mind on the part of the Claimant or its lawyers.'¹⁰³ One example is the claim in *Euromoney Institutional Investor Plc v Aviation News Ltd*, which was struck out as an abuse of process, on the basis that any damages that would have been recoverable would not have been worth the cost of the litigation, without the judge making a clear criticism of the claimant or its conduct.¹⁰⁴

⁹⁹ *Ibid*, [21]. *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, in which the 'publication ... of the allegedly defamatory material could be shown to have reached nobody to whom it meant anything': Case 45a [20].

¹⁰⁰ Case 45c [24] (Eady J).

¹⁰¹ Case 43.

¹⁰² *Ibid*, [10].

¹⁰³ Case 27 [63].

¹⁰⁴ Case 23 [143].

Several points need to be noted about this particular set of results. Firstly, judges have a tendency to be restrained in their language, meaning that comments made in judgments sometimes need to be ‘read between the lines’. For example, *Tesco Stores Ltd v Guardian News & Media*,¹⁰⁵ described to the CMS Committee as ‘an outrageous piece of bullying’,¹⁰⁶ fell into category three because of the judge’s fairly vague references to the claimant’s motive in delaying the decision whether to accept or reject an offer of amends. There is a risk that the categorisation of these comments might reflect a bias on the part of the researcher. Secondly, judges tend only to comment on issues raised by the parties to the case. This is likely to have the greatest effect on category five – a judge is likely to take the genuineness of a claimant’s motivations as a given unless an argument is raised by the defendant that the action amounts to an abuse of process. Presumably, at the very least those claims that resulted in judgment being entered for the claimant would fall into this category, but in some no comment was made by the court. Thirdly, two claimants that went on to obtain judgment in their favour against one defendant were criticised for elements of their claim relating to other defendants.¹⁰⁷

The danger of relying too heavily on judicial criticism of claimants is demonstrated by the case *Hayden v Charlton*.¹⁰⁸ In the High Court, Sharp J had described the claimants’ conduct of the litigation as ‘completely unacceptable’,¹⁰⁹ finding that the claimants had ‘no genuine desire to pursue [the litigation] or to vindicate their reputation’.¹¹⁰ These remarks were among the strongest criticisms made of any claim in the data set. However, in the Court of Appeal, it was revealed that the claimants were unaware of the striking out until the first claimant was contacted by the press for comment.¹¹¹ In that hearing, Toulson LJ stated that he had ‘no reason

¹⁰⁵ Case 50.

¹⁰⁶ CMS Evidence (n 88) Ev 130, Q429 (Nick Davies).

¹⁰⁷ Case 16b [31]; Case 40a [123].

¹⁰⁸ Case 26. A similar situation arose in Case 25: compare Case 25b [14]-[15] and Case 25c [23].

¹⁰⁹ Case 26a [70].

¹¹⁰ *Ibid*, [81].

¹¹¹ Case 26b [25].

to disbelieve’ the claimants’ evidence suggesting that the inappropriate conduct of the litigation was the fault of their solicitors.¹¹² This case was coded into category five, because the highest court to hear it accepted that the claimants were motivated by a genuine belief ‘that the perpetuation of the allegations against them has been damaging to their reputation’.¹¹³

Regardless of these issues, the proportion of cases in which the judge expressed concern with the claimant’s conduct of the litigation is startling. Five cases were placed in category two, in which the judge’s criticism of the claimants was most trenchant. Probably the most worrying of these is *Lonzim Plc v Sprague*, in which Tugendhat J had ‘no hesitation’ in describing the slander claim as ‘vexatious’,¹¹⁴ and described the claim overall as ‘totally without merit’ under CPR 3.4(6).¹¹⁵ In that case, an email sent by one of the claimants to the defendant had threatened to ‘nail you to the corporate cross for the stuff you said about us’ and ‘stomp your corporate head’.¹¹⁶ As Tugendhat J pointed out, this email was ‘further evidence’ that the claim was ‘pursued for reasons other than to obtain vindication’.¹¹⁷

Not all of the claims in category two were this extreme, but all were concerning in one way or another. In *Wallis v Meredith*, Clarke J noted that the claimants’ pre-action correspondence had been ‘persistently harsh in tone and belligerent in content’,¹¹⁸ before coming to the ‘clear conclusion’ that the action was an abuse of process.¹¹⁹ In *Dorset Flint & Stone Blocks Ltd v Moir*, Eady J agreed with the defendant’s characterisation of the claim as an ‘artificial construct’.¹²⁰ In *Duke v University of Salford*, the same judge regarded the basis of the

¹¹² *Ibid*, [34].

¹¹³ *Ibid*, [33]. It is interesting to note that both the High Court and Court of Appeal referred to the human and corporate claimants’ reputations collectively as their ‘reputation’ – this observation may be relevant to the discussion on human claimants below, at text to notes 161-84.

¹¹⁴ Case 35 [34].

¹¹⁵ *Ibid*, [54].

¹¹⁶ *Ibid*, [52].

¹¹⁷ *Ibid*, [51].

¹¹⁸ Case 54 [4].

¹¹⁹ *Ibid*, [65].

¹²⁰ Case 19 [80].

university's claim as 'wholly unreal',¹²¹ and the pleaded meanings as 'contrived in the extreme'.¹²² The last case to be included in this category was described by the judge as 'bear[ing] all the hallmarks of forum shopping',¹²³ and the damages plea as being 'doomed to failure'.¹²⁴

The third category, in which the claimant's conduct or motive was questioned, contains ten claims subject to a range of criticisms. There were several cases in which the judge expressed a view that the claim, or part of it, may have been brought for a 'collateral purpose' other than to vindicate reputation.¹²⁵ Other claimants were criticised for their 'oppressive and bullying',¹²⁶ or 'extraordinarily lax',¹²⁷ conduct of the litigation. One claimant's conduct was considered to be 'highly unreasonable and well outside the norm',¹²⁸ while another was criticised for having 'no apparent concern about the costs generated' by the litigation.¹²⁹

The fourth category, claims criticised as weak or improperly pleaded, also contains a range of cases, with five falling into this category in total. In some cases, the pleadings were described as 'gravely deficient'¹³⁰ or 'rather contrived'.¹³¹ In another, 'insufficient care' was said to have been taken with evidence presented to a Master when permission was sought to serve the claim out of the jurisdiction.¹³²

The above might appear to paint a bleak picture of corporate defamation litigation, but there were five cases in the data set in which the judge expressly declared that the claimants were

¹²¹ Case 21 [11].

¹²² *Ibid*, [14].

¹²³ Case 6 [57] (Sir Charles Gray).

¹²⁴ *Ibid*, [58].

¹²⁵ Case 2b [15] (Eady J). See also Case 10b [12]; Case 39 [94]; Case 41a [75]; Case 50.

¹²⁶ Case 28 [8] (Eady J).

¹²⁷ Case 5 [7] (Collins J).

¹²⁸ Case 44c [57] (Warby J).

¹²⁹ Case 18b [3] (Smith J), in relation to the 4th defendant. A series of criticisms, mainly tangential to the defamation claim, were also made in Case 18a.

¹³⁰ Case 38 [3] (Judge Moloney QC).

¹³¹ Case 51 [23] (Eady J).

¹³² Case 40a [123] (Eady J).

acting ‘in good faith’.¹³³ Moreover, judges in a number of cases were critical of the behaviour of defendants. As might be expected, judges were often critical of Rick Kordowski, with one describing him as a ‘vexatious litigant’.¹³⁴ Even setting that particular defendant aside, there was a suggestion that evidence had been tampered with,¹³⁵ the grant of a civil restraint order against a defendant,¹³⁶ and the predictable instances of US-based defendants refusing to defend claims made against them in English courts.¹³⁷

These findings, on balance, support the claims made during the reform debates that corporate claimants too often used defamation laws in an oppressive way. However, the important caveat must be added that this does not by any means apply to all, or even a majority of, defamation claims brought by companies.

The courts’ approach to problematic cases

All of the cases placed in the most serious category were struck out in one hearing in the High Court and not heard again, with the exception of *Atlantis World Group of Companies NV v Gruppo Editoriale L’Espresso SpA*,¹³⁸ in which the claim failed at trial. Although this might seem to be encouraging, it may hide the true burden of defamation litigation on defendants. As an example, the *University of Salford* action was the subject of a hearing before a District Judge in Manchester before permission to appeal was rejected on paper twice, then granted at an oral hearing. Following the striking out of the claim by the High Court, permission to appeal to the Court of Appeal was granted before the claim was finally abandoned, the university having spent £150,000 in costs in the process.¹³⁹

¹³³ Case 27 [44] (Tugendhat J). See also Case 37 [50]; Case 24a [15], [39]; Case 11a [50]; Case 26b [33].

¹³⁴ Case 34 [183] (Tugendhat J).

¹³⁵ Case 33 [48]. See also Case 4b [7], holding that the defence had ‘been built on a lie.’

¹³⁶ Case 22 [50]-[59].

¹³⁷ Case 16c; Case 40b.

¹³⁸ Case 6.

¹³⁹ Ben Clay, ‘University Abandons Failed £150,000 Libel Appeal’ *The Salfordian* (13 May 2013) <www.thesalfordian.co.uk/2013/05/university-abandons-failed-150000-libel-appeal/>.

Although the number of claimants criticised is troubling, it is difficult in most cases to see what more the courts could have done with respect to those claims. Some commentators have argued for the more effective use of striking out mechanisms,¹⁴⁰ but there do not appear to be any obvious cases in which the court's power to strike out a claim could have been used but was not, and, of course, the use of the power depends on the defendant having made an application to strike out. Arguments for the more effective use of strike out must also take into account claimants' article 6 right to a fair trial.¹⁴¹

One interpretation of section 1 of the 2013 Act is that its primary effect will be to enable the courts to strike out claims that do not disclose any evidence of harm to reputation or financial loss.¹⁴² This appears to be plausible, albeit in a small number of cases. In *Jameel v Times Newspapers Ltd* and *Citation Plc v Ellis Whittam Ltd*, permission was granted to appeal a High Court decision striking out the claim,¹⁴³ despite the paucity of evidence of financial loss in each.¹⁴⁴ It is possible that these claims would have been dealt with more quickly (or perhaps not brought at all) under the new regime.

The case that would most obviously have been affected by section 1(2) is *Howe & Co v Burden*.¹⁴⁵ In that case, Eady J held that there was insufficient evidence to grant summary judgment in favour of the defendants, even though he found that the statements complained of 'do not seem to have reached a wider audience or done the Claimants any harm'.¹⁴⁶ However, it is notable that this case falls in the first year of the period studied – the claim would almost certainly have been struck out had it been heard after the Court of Appeal's decision in *Jameel*

¹⁴⁰ Mullis and Scott, 'Something Rotten' (n 4) 180-1.

¹⁴¹ See Case 39 [87]. Article 6 is applicable to corporations: eg *Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 6 October 2011).

¹⁴² eg Matthew Collins, *Collins on Defamation* (OUP, 1st edn 2014) paras 7.72-3.

¹⁴³ Case 30b; Case 11c.

¹⁴⁴ Case 30a [40]; Case 11a [47].

¹⁴⁵ Case 28.

¹⁴⁶ *Ibid*, [10].

v Dow Jones, which allows the courts to strike out claims that do not assert a ‘real and substantial tort’.¹⁴⁷

Claimants’ alternative options

A common argument made by those who supported the complete removal of the right to sue in defamation from some or all corporations was that means of obtaining vindication other than a defamation suit are often available to companies. The argument is put in several ways. Firstly, alternative legal remedies – typically the tort of malicious falsehood – are considered to provide sufficient protection to corporate reputation.¹⁴⁸ Secondly, it is suggested that, in some cases, a corporation will be able to vindicate its reputation through an action brought by an employee or director.¹⁴⁹ Finally, it is contended that corporations have access to extra-legal means of achieving vindication, such as publicity campaigns, that tend not to be available to individuals.¹⁵⁰

I should point out at this stage that I see all of these variants of the argument as logically flawed. The availability in some cases of an alternative action in malicious falsehood, or any other tort, has very little in principle to do with whether a company should be entitled to sue in defamation. As recognised by the Court of Appeal, the two torts ‘have developed with different characteristics; they make different demands on the parties; and they offer redress for different things.’¹⁵¹ The question of the right to sue in defamation should be answered with reference to the particular functions and features of that tort, not a variety of other causes of action that may or may not be available in some cases where a company has a potential defamation claim.

¹⁴⁷ [2005] EWCA Civ 75.

¹⁴⁸ CMS Committee Report (n 7) para 178. Cf Joint Committee Report (n 82) para 112; Alastair Mullis and Andrew Scott, ‘Worth the Candle? The Government’s Draft Defamation Bill’ (2011) 3(1) *Journal of Media Law* 1, 16; Afia and Hartley (n 64) 190.

¹⁴⁹ CMS Committee Report (n 7) para 176; FSINFS (n 2) 10. Cf *Jameel v WSJ* (n 3) [21] (Lord Bingham).

¹⁵⁰ CMS Committee Report (n 7) para 176; Joint Committee Report (n 82) para 112; Mullis and Scott, ‘Something Rotten’ (n 4) 179.

¹⁵¹ *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609, [30] (Sedley LJ).

The second argument is fallacious for the same reason – the right of a person associated with a company to sue in defamation for statements harming her reputation is logically distinct from the right of the company to sue, even in cases where the same statement harms the reputations of the company and the person simultaneously.

The third argument, that companies have extra-legal means available to counter defamatory falsehoods, is flawed on a number of counts. The first is that it is not necessarily true in all cases. Responding to an equivalent argument made about ‘public figure’ claimants, Eric Barendt notes that ‘it is simply not true that public figures ... necessarily have an effective opportunity to put the record straight when defamatory remarks are made about them.’¹⁵² The same point could be made with regard to corporate claimants. The suggestion that corporations should deploy ‘rehabilitative advertising or public relations campaigns’,¹⁵³ rather than investing shareholders’ money in advertising for usual reasons, also seems odd. At least when a company litigates in an attempt to counter harm caused by defamatory falsehoods, some of the funds spent on the litigation will be recoverable if it succeeds.

This latter argument cannot, at any rate, be considered in depth here, except to say that the seven claims brought against ‘traditional’ media companies presumably represent instances in which the corporate claimant was unable, through pre-action correspondence or otherwise, to exert enough influence on the media to control coverage.¹⁵⁴ The suggestion that ‘smaller companies [are] unable to issue proceedings against ... well-financed media defendants’¹⁵⁵

¹⁵² Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 209.

¹⁵³ Joint Committee on the Draft Defamation Bill, *Evidence* (2010-12, HL 203, HC 930-III) Ev 51 (Media and Communications Committee of the Business Law Section of the Law Council of Australia). Hereafter ‘Joint Committee Evidence’.

¹⁵⁴ A similar point was made by Magnus Boyd, who suggested that the claim brought by Tesco against the *Guardian* was not an example of the chilling effect, because ‘having been provided with a clear denial before publication (together with evidence), the *Guardian* still published the allegations.’ Boyd (n 87).

¹⁵⁵ Afia and Hartley (n 64) 189.

may also be true – *Andrew James Enforcement Ltd v ITV Plc* appears to be the only case against a large media company brought by a relatively small corporate claimant.¹⁵⁶

Regardless of the problems with the other two strands of this argument, it is important to investigate them for two reasons. Firstly, they were influential during the reform process, and one of my intentions here is to test the claims made during those debates. Secondly, if either of them is found to be true, then it may still make a valid contribution to a broader argument for reform. After all, if every corporate defamation claimant was also suing in malicious falsehood, and obtaining the same outcome through that tort, then one of those causes of action would be redundant.

Alternative legal remedies

The claimant(s) in 18 of the 54 cases asserted at least one other cause of action in addition to libel or slander. Predictably, the most common of these is malicious falsehood, pleaded in half of those 18 cases. In one case, the claimants relied on ‘no less than ten causes of action’,¹⁵⁷ although this was an outlier – no other claimant relied on more than three.

Of the 12 claimants that obtained judgment in their favour, four relied on at least one alternative cause of action,¹⁵⁸ one of which was abandoned.¹⁵⁹ All three of the remaining claimants were successful in both libel and the alternative cause(s) of action.

It is interesting to note that, of the 21 claims criticised in some way by the courts, just six featured a claim in a cause of action other than libel or slander. Further, of the 13 claims struck out, just two included a claim other than defamation.¹⁶⁰ This suggests that those companies

¹⁵⁶ Case 3.

¹⁵⁷ Case 18c [4].

¹⁵⁸ Case 14 (breach of confidence); Case 34 (data protection/harassment); Case 20 (breach of contract).

¹⁵⁹ Case 17 (malicious falsehood).

¹⁶⁰ Case 16 and Case 23. Not included are Case 51 or *Tesla* (n 43), in which the claims in defamation were struck out but the claims in malicious falsehood were not.

illegitimately using the court process to silence criticism overwhelmingly do so through the defamation torts.

With regard to claims brought only in defamation, it is difficult to assess the potential applicability of a different cause of action. Nevertheless, combined with the observations below on human claimants, this study suggests that the ‘alternative options’ argument has some weight.

Human claimants

In almost half (26) of the claims analysed, the corporate claimant sued alongside one or more human claimants. When looking only at those claims in which there was a finding of liability, the proportion involving human claimants rises significantly. Of the twelve cases in this category, only three were brought solely by corporate claimants.¹⁶¹

These statistics have concerning implications. In *Jameel v Times Newspapers Ltd*, Sedley LJ warned of the need for ‘caution’ in allowing companies to claim alongside their owners or directors. He suggested that ‘[i]f every libel claimant is able to draw in his wake a string of companies claiming that they have been injured because their proprietor has been, English libel litigation, already something of a honeypot, will become a goldrush.’¹⁶² Additional claims by corporations inevitably increase the cost of defending actions, and may also have a substantial effect on damages.

When the late inclusion of section 1(2) in the Defamation Bill was being debated in the House of Commons, Sir Edward Garnier MP suggested that corporate defamation claimants ‘probably attract £20,000 [in general damages] at the top end and usually no more than £10,000, so we

¹⁶¹ Case 16; Case 33 and Case 40.

¹⁶² Case 30b [36].

are not talking about hugely extravagant damages claims.¹⁶³ This is, generally, true – although Garnier presumably forgot about *Cooper v Turrell* and *Metropolitan International Schools Ltd v Designtecnica Corp*, in which the corporate claimants were awarded general damages of £30,000 and £50,000 respectively.¹⁶⁴ The average award of general damages (discounting those cases in which no general damages were awarded¹⁶⁵) was slightly over £15,000. However, once the awards made to human claimants and the awards made to corporate claimants in alternative causes of action are taken into account, along with the special damages award in *Culla Park Ltd v Richards*,¹⁶⁶ the average *liability* increases to over £40,000, plus costs. It must also be remembered that these awards were almost all made against human defendants, and not against well-resourced media companies. Of the three corporate defendants found liable, those in *Downtex Plc v Flatley* and *Ernst & Young LLP v Coomber* appear to have been small companies closely linked to a human defendant.¹⁶⁷

Some of these corporate claims, especially that in *Applause Store Productions Ltd v Raphael*,¹⁶⁸ appear to add very little to the claim brought by the associated human claimant. The corporate claimant in *Applause Store* was able to recover £5,000 in defamation, alongside a total of £17,000 granted to the human claimant in defamation and breach of confidence, despite the fact that there was no evidence of publication to more than a few people,¹⁶⁹ and no evidence of loss.¹⁷⁰ Had the claimant in *Jon Richard Ltd v Gornall* not been granted summary judgment,¹⁷¹ with damages therefore capped at £10,000,¹⁷² the judge considered that the appropriate award

¹⁶³ HC Deb 24 April 2013, vol 561, col 917. One must ask from whose perspective Garnier is defining ‘extravagant’ – it may be that he and his colleagues could afford to pay these damages, but I certainly couldn’t.

¹⁶⁴ Case 14 [101]; Case 40b [35].

¹⁶⁵ Case 7; Case 34.

¹⁶⁶ Case 17b: see note 196.

¹⁶⁷ Case 20; Case 22.

¹⁶⁸ Case 4a.

¹⁶⁹ *Ibid*, [73].

¹⁷⁰ *Ibid*, [69].

¹⁷¹ Case 33.

¹⁷² Defamation Act 1996, s 9(1)(c).

of damages – in a case where no loss was shown, and remembering that corporate claimants are not entitled to aggravated damages¹⁷³ – would have been £75,000.¹⁷⁴ This is not a modest sum by any measure.

Further, of the three successful companies that did not sue alongside a human claimant, two are likely to have been successful had they relied on malicious falsehood,¹⁷⁵ which requires proof of falsity, loss and malice. In *Creative Resins International Ltd v Glasslam Europe Ltd*, Eady J found that the claimant had established falsity.¹⁷⁶ He also held that the statements complained of were ‘calculated to undermine [the claimant’s] commercial reputation’;¹⁷⁷ worded similarly to the requirements of the Defamation Act 1952, section 3.¹⁷⁸ Finally, he found that a potential defence of qualified privilege would have been defeated by proof of malice, since the publication ‘took place cynically and dishonestly.’¹⁷⁹ A malicious falsehood claim in *Jon Richard*¹⁸⁰ would have depended on whether expenditure in mitigation of loss counts as damage in that tort,¹⁸¹ as the statement complained of caused no other loss. Falsity and malice would not have presented a problem for the claimant in that case.

Therefore, disregarding those companies with alternative causes of action, only one successful corporate claimant in ten years remains – Metropolitan International Schools Ltd. Of course, this obscures the reality somewhat – removing the right to sue from companies would affect

¹⁷³ *Collins Stewart Ltd v The Financial Times Ltd (No 2)* [2005] EWHC 262 (QB): ‘the defining characteristic of an award of aggravated damages is that its function is to provide a claimant with compensation (“solatium”) for injury to his or her feelings ... a company has no feelings to injure’ (Gray J).

¹⁷⁴ Case 33 [45].

¹⁷⁵ Rolph points out the potential side-effect of this – the greater availability of pre-publication injunctions in malicious falsehood: David Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) 22(7) *Entertainment Law Review* 195, 199-200.

¹⁷⁶ Case 16c [13].

¹⁷⁷ *Ibid*, [10].

¹⁷⁸ A claimant in malicious falsehood is not required to prove special damage where the statement complained of was ‘calculated to cause pecuniary damage.’

¹⁷⁹ Case 16c [20].

¹⁸⁰ Case 33.

¹⁸¹ This point is unclear: see Richard Parkes and Alastair Mullis (eds), *Gatley on Libel and Slander* (Sweet and Maxwell, 12th edn 2013) para 21.13, note 100 (‘Gatley’).

all of those potential claimants who might legitimately use the threat of proceedings to extract an apology, retraction or settlement.

Nevertheless, there is widespread and justified discontent at the capacity of corporations to stifle speech on matters of public interest through the threat of a defamation suit. A corporation's defamation claim does not need to be successful – or even to be heard – in order to have a stifling effect of freedom of expression. These negative externalities of the corporate right to sue can most effectively be mitigated by removing that right. In Australia, for example, corporate threats to sue against one media outlet 'all but disappeared' within a year of the removal of the right to sue from larger companies.¹⁸² Changes to the substantive law short of removing the right to sue will not prevent companies from making these threats. In this context, it is essential that a clear and convincing justification is given for the continued existence of the corporate right to sue. The apparent lack of companies that successfully sued in defamation over the period studied, and that could not have vindicated their reputations through other means, indicates that such a justification may not exist.

When one takes into account the observation made below, that some successful claimants may have been relying on a defamation claim as their 'last chance' to vindicate their reputations against unresponsive defendants,¹⁸³ it may be desirable to allow a company to pursue a defamation claim if it can demonstrate to the court that there is no alternative course of action, legal or extra-legal, that would offer it a reasonable prospect of obtaining comparable vindication. The concerns expressed about the costs implications of a permission stage are valid,¹⁸⁴ but it seems likely that a substantial proportion of claims would be dispensed with much more quickly and less expensively under a system such as this.

¹⁸² Mark Pearson, 'A Review of Australia's Defamation Reforms after a Year of Operation' (2007) 29(1) *Australian Journalism Review* 41, citing Mark Polden, 'In-house counsel at Fairfax Media'.

¹⁸³ See text to notes 244-7.

¹⁸⁴ HL Deb (n 9) col 1367 (Lord McNally).

Financial loss

The pleading of financial loss by corporate claimants was a major theme in the reform debates. On the one hand, some expressed concern at the ability of companies to sue ‘where there is no realistic prospect of serious financial loss.’¹⁸⁵ On the other, it was often suggested that the requirement to prove actual loss would be too onerous on corporations.¹⁸⁶ This was one of the major reasons given by the House of Lords in *Jameel v Wall Street Journal Europe SPRL* (*‘Jameel v WSJ’*) for its refusal to require corporate claimants to demonstrate loss.¹⁸⁷

This latter argument is rather weak. Firstly, as has been noted elsewhere, proof of loss is required in almost all other torts.¹⁸⁸ Secondly, and probably more importantly, the rule in *Ratcliffe v Evans*, allowing claimants to rely on a ‘general loss of business’ where special damage is not quantifiable,¹⁸⁹ was designed to reduce the burden on claimants that might struggle for legitimate reasons to precisely quantify their loss. Regardless, the argument was often raised during the reform process, and appears to have been the main reason for the inclusion of the words ‘or is likely to cause’ in section 1(2).¹⁹⁰

This section intends to investigate whether the perception that it was too easy for companies to sue without proof of loss was accurate. It also seeks to examine claims about the difficulty of pleading loss.

To those ends, the cases were coded into one of five categories, as follows:

1. No reference to financial loss in judgment(s).
2. Claimant pleaded special damage.

¹⁸⁵ Joint Committee Report (n 82) para 114.

¹⁸⁶ Joint Committee Evidence (n 153) Ev 21 (Law Society).

¹⁸⁷ *Jameel v WSJ* (n 3) [26] (Lord Bingham), [102] (Lord Hope), [121] (Lord Scott).

¹⁸⁸ *Ibid*, [91] (Lord Hoffman); Tony Weir, *Casebook on Tort* (Sweet and Maxwell, 10th edn 2004) 637; Jan Oster, ‘The Criticism of Trading Corporations and their Right to Sue in Defamation’ (2011) 2 *Journal of European Tort Law* 255, 279.

¹⁸⁹ *Ratcliffe v Evans* [1892] 2 QB 524 (CA) 532-3 (Bowen LJ).

¹⁹⁰ Joint Committee Report (n 82) para 115.

3. Reference to unquantified or unquantifiable loss.
4. Other - reference to some other kind of loss or harm.
5. No evidence of loss or no loss caused.

There are a number of difficulties with investigating pleas of financial loss through these judgments. Firstly, statements of claim were not readily available. In order to avoid the introduction of bias, those that were found were not used. Therefore, the results rely on the judge mentioning the extent to which damage is pleaded – hence, a large proportion of claims (18 of 54) fall into category one. Secondly, there was no requirement on any of these claimants to demonstrate loss (at least as regards their claims in defamation). Reliance on the presumption of loss does not necessarily mean that no actual loss was caused by the statement complained of, or that such loss could not have been proved. This is especially the case if one accepts Tugendhat J's statement on the presumptions of loss and falsity:

Claimants normally rely on these presumptions only during the stages of the proceedings up to the trial of the action. At any trial (or any assessment of damages) claimants normally choose to put before the court evidence with a view to proving both that the words complained of are false, and that the claimants have suffered actual damage as a result of the defamatory publication.¹⁹¹

Given that only nine of the judgments studied were with respect to trials or assessments of damages, this effect – if real – may skew the data collected towards showing a failure to adduce evidence of loss.¹⁹²

¹⁹¹ Case 40b [5].

¹⁹² One effect of s 1(2) of the 2013 Act may be to encourage claimants to plead financial loss earlier on in the litigation process.

Nevertheless, there were 15 cases – over a quarter of those analysed – in which the court noted either that no evidence of loss had been given, or that no loss had been caused by the statement complained of.

Some of these cases were more worrying than others. *Wallis v Meredith*,¹⁹³ for example, involved a statement published to only one person, the claimants' solicitor, which could not reasonably have caused any loss. Similarly, in *Jeeg Global Ltd v Hare*, the statement in question was published to only one person, who did not believe it.¹⁹⁴ Both of these claims would surely have been struck out under section 1(2) of the 2013 Act; under the pre-existing law, only the former was.

Special damage pleas were rare – seven, in six cases¹⁹⁵ – and almost never successful. The only award of special damages was made in *Culla Park*, in which £70,000 was claimed and £39,000 awarded.¹⁹⁶ It may be concerning that, of these special damage pleas, four were in the millions of pounds, and one was for roughly £750,000.¹⁹⁷ The largest damages claim was for approximately £230 million.¹⁹⁸ Claims of these proportions, even though all were unsuccessful, inevitably increase the uncertainty caused to defendants by the possibility of losing in court.

Eight claimants argued that they had suffered or would suffer financial loss, but that the loss was as-yet unquantified,¹⁹⁹ or that it was by nature unquantifiable. Those cases falling into the latter part of this category may indicate that some of the concerns about the difficulty of pleading financial loss are well-founded. In *Coys Ltd v Autocherish Ltd*, an application for an interim injunction, the claimants contended – and the judge accepted – that ‘there may never be a way of showing what damage [would] be caused’ if the defamatory statements were

¹⁹³ Case 54.

¹⁹⁴ Case 32 [23].

¹⁹⁵ Including two in *Ontulmus v Collett* (Case 44), one for each corporate claimant.

¹⁹⁶ Case 17b [32]-[37].

¹⁹⁷ Case 44c [8]: the second claimant, MTH Yaticilik, claimed €900,000 in lost commission.

¹⁹⁸ Case 13 [19].

¹⁹⁹ eg Case 18b [9]; Case 36 [7].

repeated.²⁰⁰ Similarly, the claimants in *Mama Group Ltd v Sinclair*, organisers of a music festival, noted that ‘the costs of finding persons who had not turned up to the festival for the loss of profit on one ticket would be prohibitive.’²⁰¹ These are valid concerns, but, again, these situations are precisely the kind in which the claimants would be assisted by the rule in *Ratcliffe v Evans*.

Seven claims fell into the ‘Other’ category. One of these – *Adelson v Associated Newspapers Ltd* – was included for the claimant’s somewhat ambiguous claim that loss was likely to result from the impairment of its ‘ability to negotiate for business to be carried on by a subsidiary to be formed in the future’.²⁰² Another was included for an extremely vague reference to a ‘potentially valuable trademark’.²⁰³ The remaining five in this category were all successful claimants with no direct evidence of financial loss. In three of these claims, the judge made reference to the likelihood of injury to goodwill or similar;²⁰⁴ in the other two, reference was made to the effect of the statement complained of on existing or potential employees.²⁰⁵

Some of these claimants may have struggled to meet the requirements of section 1(2), but it is not possible to say that their defamation claims would inevitably have failed under the 2013 Act, especially given Warby J’s willingness to accept some fairly vague evidence of loss in *Brett Wilson LLP v Person(s) Unknown*.²⁰⁶

Nonetheless, there were a few cases in which successful claimants had little or no evidence of loss. As mentioned above, the corporate claimant in *Applause Store* would likely have failed to overcome the ‘serious financial loss’ hurdle.²⁰⁷ Similarly, in both *Jon Richard* and *Pritchard*

²⁰⁰ Case 15 [25], [47] (Tugendhat J).

²⁰¹ Case 37 [39].

²⁰² Case 2a [70] (Tugendhat J).

²⁰³ Case 39 [86].

²⁰⁴ Case 16c [10]; Case 40b [6]; Case 46a [31].

²⁰⁵ Case 34 [44] (with respect to Hine Solicitors, the second claimant); Case 14 [46], [55], [100].

²⁰⁶ [2015] EWHC 2628 (QB).

²⁰⁷ See text to notes 168-70.

Englefield, there was no evidence of financial loss – although in the latter the human claimant would have been unaffected, and in the former there may have been a viable claim in malicious falsehood.²⁰⁸

The difficulty of assessing the likely effect of section 1(2) on the claims studied has already been noted. There may be some examples of cases that the courts could have dispensed with more efficiently had they had the 2013 Act at their disposal. However, there are a number of cases where it seems unlikely that the ‘serious financial loss’ requirement would have had a significant effect. It is important to note that even those claims that would have been struck out under section 1(2) could still have been brought, and potentially could have been the subject of several preliminary hearings. For those potential defendants with limited means, the expense of having a claim against them struck out at an early stage, although less than the cost of a full trial, is still sufficient to create a significant chilling effect on expression. In this sense, the effect of the 2013 Act, both in the courts and more widely, may only be marginal.

Categorising corporate claimants

As the Joint Committee on the Draft Defamation Bill noted, there is ‘enormous variety in the size, available resources and influence of corporations’,²⁰⁹ and this variety appears to be reflected in the range of claimants that sued for defamation between 2004 and 2013.²¹⁰

As a result, the nature of any reform directed at corporate defamation claimants was not the only choice that Parliament needed to make in the 2013 Act. Another important consideration was the *scope* of that reform; that is, which corporate claimants it would relate to. Parliament chose, in sub-section 1(2), the phrase ‘body that trades for profit’ to delineate those non-human

²⁰⁸ See text to notes 180-1.

²⁰⁹ Joint Committee Report (n 82) para 110.

²¹⁰ See text to notes 58-62.

claimants that would be subject to the serious financial loss requirement from those that would be subject only to the ‘serious harm’ requirement in sub-section (1).

Other jurisdictions have taken different approaches. Legislation in both Ireland and New Zealand refers to ‘bod[ies] corporate’,²¹¹ while in Australia the right to sue was removed from some companies based on their number of employees and their objects.²¹² The defendants in *McDonalds Corp v Steel* (*McLibel*) and *Jameel v WSJ* proposed restrictions on the right to sue of ‘multinational corporations’ and ‘foreign corporations’ respectively,²¹³ and the Libel Reform Campaign suggested that ‘large and medium-sized corporations’ should not be permitted to sue in defamation.²¹⁴

The results of this study suggest that this is a very significant issue, and possibly reveal a fundamental difficulty with the law of corporate defamation. On the one hand, perhaps the most striking observation to be made of the cases as a whole is their lack of homogeneity. This might suggest that treating all corporate claimants in the same way would be problematic or unjust. On the other, concerns about the inevitable arbitrariness of a dividing line, and about the specific lines that have been suggested, are strongly supported by the data.

In Australia, one of the most significant criticisms of the law removing the right to sue from some corporations has been of its scope. In its evidence to the Joint Committee on the Draft Defamation Bill, a committee of the Law Council of Australia reported ‘a general consensus that the current corporations provision gives rise to serious anomalies, principally because of the arbitrary nature of the definition of “excluded corporations”’.²¹⁵ The difficulties faced in Australia suggest that distinguishing corporations based on employee numbers, an approach

²¹¹ Defamation Act 2009 (Ireland) s 12; Defamation Act 1992 (NZ) s 6.

²¹² See note 5.

²¹³ *McDonalds Corp v Steel* [1999] EWCA Civ 1144; *Jameel v WSJ* [2005] EWCA Civ 74 [99].

²¹⁴ FSINFS (n 2) 10.

²¹⁵ Joint Committee Evidence (n 153) Ev 51. See also Matt Collins, ‘Protecting Corporate Reputations in the Era of Uniform National Defamation Laws’ (2008) 13 *Media & Arts Law Review* 447.

apparently endorsed by the Libel Reform Campaign,²¹⁶ is not particularly effective. As the Joint Committee noted, ‘there may not be a link between the commercial power of a corporation and the number of people it employs.’²¹⁷

The proposals of the defendants in *McLibel* and *Jameel v WSJ* are also problematic. The increasing tendency for large companies to be organised in complex corporate groups means that the term ‘multinational corporation’ can rarely be applied to any individual legal person that would have capacity to sue in defamation.²¹⁸ The defendants in *Jameel v WSJ* did not suggest how corporate claimants registered in the UK but forming part of a group owned ultimately by an overseas company should be dealt with.²¹⁹ In one of the cases studied here, the judge admitted uncertainty as to the place of the claimant in a larger corporate group.²²⁰

The Joint Committee’s observation that employee numbers do not necessarily reflect financial strength is also applicable to these other potential dividing lines, but using a direct measure of financial strength would also be problematic. In a futile attempt to investigate the ‘inequality of arms’ issue, I obtained from Companies House all available and relevant accounts filed by the corporations involved in the cases studied. This process revealed a number of issues with relying on a financial measure to differentiate between corporate claimants. Probably the most significant issue is the difficulty of finding an appropriate metric for a corporate claimant’s capacity to spend on litigation, but this is compounded by the inconsistent availability or standard of accounts, especially with regard to small or overseas-registered companies; and by the problems caused by corporate groups.

²¹⁶ FSINFS (n 2) 10.

²¹⁷ Joint Committee Report (n 82) para 111, footnote 182.

²¹⁸ See the problems caused by corporate groups in Case 2, Case 6, Case 12, Case 13 and Case 39, for example.

²¹⁹ eg the claimants in Case 9, Case 30 and Case 51.

²²⁰ Case 52 [2]-[5].

In the context of a proposed requirement to prove financial loss in order to establish liability, Mullis and Scott contended that ‘many companies may be unwilling to release financial information that would establish the extent of the loss’.²²¹ If this is true, then basing the right to sue on a financial measure would mean that companies may be required to divulge confidential information, not even to establish liability or entitlement to damages, but merely to establish standing. If such evidence is not adduced, then the claimant may be put at a significant disadvantage.²²² This may have a chilling effect of its own – on the willingness of corporate claimants to pursue even legitimate lawsuits.

Parliament’s approach in the Defamation Act 2013 was to distinguish when a given claimant would or would not be subject to the section 1(2) restriction on the basis of whether or not it ‘trades for profit’. The rationale for this distinction appears to have been to exclude charities from the ambit of the section, mainly on the basis that it would be more difficult for them to prove financial loss.²²³ There may also have been a perception that the chilling effect on freedom of speech was primarily, or wholly, caused by for-profit companies.²²⁴ However, the dividing line drawn in the 2013 Act presents its own problems.

The most significant problem is that non-human claimants that would not be covered by section 1(2) can, and do, abuse defamation laws. Mullis and Scott have suggested that, although ‘any line drawn will be artificial’, the Australian position (permitting defamation suits by non-profit organisations as well as companies with a small amount of employees) has ‘the merit of recognising that the capacity of a very small company, or even a small charity, to threaten a national media group is likely to be limited.’²²⁵ What Mullis and Scott did not mention,

²²¹ Mullis and Scott, ‘Worth the Candle?’ (n 148) 16.

²²² See, in the context of security for costs, Case 44b [41]: the claimant ‘cannot complain if the court declines to speculate upon evidence that it has chosen not to adduce.’ (Tugendhat J).

²²³ Joint Committee Report (n 82) para 118.

²²⁴ *Ibid.*

²²⁵ Alastair Mullis and Andrew Scott, ‘Lord Lester’s Defamation Bill 2010 – A Distorted View of the Public Interest?’ (2011) 1 *Communications Law* 6, 14.

however, and what Parliament failed to take into account, is the capacity of *large* charities, or other non-profit bodies, to chill expression.

In fact, two of the more egregious examples of abusive lawsuits found in the data were brought by the University of Salford²²⁶ and the British Chiropractic Association,²²⁷ neither of which are for-profit organisations. These claimants would probably not be subject to the ‘serious financial loss’ requirement that was meant to stop this kind of abuse.²²⁸ It may be that Parliament’s decision not to extend the restriction in section 1(2) to non-profit bodies is already having negative consequences for debate on matters of public interest. Although the available information is limited, *Private Eye* recently reported a threat to sue made by the True and Fair Foundation, a registered charity, against City University London over a report produced by researchers at the Cass Business School.²²⁹

Further, the widely expressed concern about the effect on charities of restricting or removing legal persons’ right to sue in defamation appears to be misplaced. Although non-profit bodies such as the Law Society do occasionally sue,²³⁰ charities seem rarely, if ever, to resort to defamation law. Even *Gatley*, noting the right of charities to sue, makes no reference to an English case in which this right has been utilised;²³¹ and, as demonstrated by *North London Central Mosque Trust*, unincorporated charities have no standing to sue.²³² Admittedly, the New South Wales branch of the RSPCA has sued in defamation since the Australian reforms

²²⁶ See text to notes 121-2.

²²⁷ The BCA’s lawsuit was described by the Court of Appeal as ‘an endeavour ... to silence one of its critics’: Case 10b [12].

²²⁸ David J Acheson, ‘The Defamation Act 2013: What Exactly is ‘A Body that Trades for Profit’?’ (2015) 20(4) *Communications Law* 113. Cf *Gatley* (n 181) para 2.8.

²²⁹ ‘Critical Response’ *Private Eye* (London, 1 April 2016) 40.

²³⁰ Case 34. The Law Society’s claim in defamation was unsuccessful. Another example might be Gentoo Group Ltd (Cases 24 and 49), described as a ‘charitable community benefit society’: <<http://www.gentoo-group.com/about-us/who-we-are/>>.

²³¹ *Gatley* (n 181) para 8.19.

²³² Case 43.

were introduced,²³³ but this kind of action appears to be exceptionally rare.²³⁴ If a fundamental aspect of the law of corporate defamation, and one that may allow future claimants such as the British Chiropractic Association to abuse the process of the courts, is based on the idea that charities might sometimes feel it necessary to seek a legal remedy for reputational harm, then future research testing whether or not this is actually the case would be extremely valuable.²³⁵

Perhaps the only consistent and principled way in which to approach corporate defamation claimants is to recognise the one attribute that they all share – they are not human beings.²³⁶ This fact alone does not necessarily lead to the conclusion that corporations should not be entitled to sue in defamation. It merely indicates that, whatever limitation it is considered appropriate to apply to corporate defamation claimants, it ought to apply to all of them.

Assorted observations

As previously mentioned, although the foregoing discussion relates to the main aims of this study, I did not want to ignore other interesting patterns that might emerge from the data. Two such patterns did, and they are addressed in this section.

Unrepresented defendants

The first is that almost all of the claimants that obtained judgment in their favour did so against defendants who were unrepresented or who represented themselves. The only exceptions were the defendants in *Applause Store* and *Robins v Kordowski*,²³⁷ both of whom were represented by counsel acting pro bono. In fact, the last time a corporate claimant obtained judgment against

²³³ *Royal Society for the Prevention of Cruelty to Animals New South Wales v Davies* [2011] NSWSC 1445.

²³⁴ One reference to a seemingly legitimate use of the right to sue by a charity in the UK is found in David Hooper, *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown, 1st edn 2000) 26: describing the successful use of an arbitration procedure by the Joseph Rowntree Foundation against the Sunday Times.

²³⁵ This might be achieved by surveying charities; alternatively, if better data on claims filed becomes available in the future, some insight may be gained from investigating that data.

²³⁶ *Gatley* (n 181) para 2.8.

²³⁷ Case 4; Case 46.

a defendant represented by counsel that they had paid appears (after a non-exhaustive search) to have been over 15 years ago, in *Takenaka (UK) Ltd v Frankl*.²³⁸ This trend also seems to be continuing: the defendants in *ReachLocal UK Ltd v Bennett*,²³⁹ *The Bussey Law Firm PC v Page*,²⁴⁰ and of course *Brett Wilson LLP v Person(s) Unknown*,²⁴¹ were all either unrepresented or self-represented.

There are a number of ways of interpreting this observation. One is that the courts are insufficiently accommodating to defendants in person. This would be consistent with a study by Chris Hanretty, which found that the relative experience of counsel had an effect on the decisions of the House of Lords.²⁴² If true, this may also be a factor in the ‘inequality of arms’ problem, in that some corporate claimants have better access to experienced counsel than individual defendants. Another interpretation might be that unrepresented defendants are less likely to be advised to settle their cases. Either of these explanations would be supported by the fact that only two defendants appearing in person were not found liable.²⁴³ The latter explanation would be consistent with the relative lack of media defendants in the cases studied.

It should also be noted that of the ten unrepresented defendants that lost their cases, four refused to defend the claim at all.²⁴⁴ These cases may represent a ‘last chance’ for the claimant to obtain some vindication against an unresponsive critic,²⁴⁵ sometimes from the US, where English libel awards cannot be enforced.²⁴⁶ In *Creative Resins*, for example, the US-based defendant was

²³⁸ *Takenaka* (QB, 11 October 2000); [2001] EWCA Civ 348.

²³⁹ [2014] EWHC 2161 (QB); [2014] EWHC 3405 (QB).

²⁴⁰ [2015] EWHC 563 (QB).

²⁴¹ [2015] EWHC 2628 (QB).

²⁴² Chris Hanretty, ‘Haves and Have-Nots before the Law Lords’ (2014) 62 *Political Studies* 686.

²⁴³ Case 21; Case 26.

²⁴⁴ Case 16c [2]; Case 22 [5]; Case 33 [13]; Case 40b [9].

²⁴⁵ One way of accounting for this possibility is suggested above, at text to notes 183-4.

²⁴⁶ SPEECH Act 28 USC 4101-5.

criticised for sending an ‘insulting’ letter challenging the claimant to ‘bring it on in the USA’.²⁴⁷

Publication on a matter of public interest: a fault-based corporate defamation law?

A further intriguing observation relates to the public interest in statements made about companies, an issue that has been highlighted by commentators as well as by the courts.²⁴⁸

Although only nine cases involved discussion of the public interest in the statements complained of – probably due to the perceived difficulty and expense of pleading the *Reynolds* defence²⁴⁹ – in almost all of those cases, the judge found that the statement *was* on a matter of public interest.

The only exceptions were two of the claims brought against Rick Kordowski. Both share an important feature: it was the *publication* of the statements complained of that was not in the public interest, rather than their subject matter. In other words, there was no case in which discussion of the activities of the corporate claimant was held not to be in the public interest. Rather, where public interest defences failed, they did so because of the manner or circumstances of the publication in question. In *Awdry Bailey and Douglas*, Tugendhat J held that there was ‘no public interest in the *publication* of the words complained of, which express the personal grievances of [the author]’.²⁵⁰ In *Law Society*, the claimants accepted that ‘[i]nformed debate on [solicitors’ conduct] is clearly in the public interest’,²⁵¹ and the court made its decision on the issue based on the need ‘to protect the public from the unjustifiable dissemination of false information about the suppliers of goods and services.’²⁵²

²⁴⁷ Case 16c [2].

²⁴⁸ Fiona Patfield, ‘Defamation, Freedom of Speech and Corporations’ (1993) 3 *Juridical Review* 294, 300; *Jameel v WSJ* (n 3) [158] (Baroness Hale).

²⁴⁹ See Eric Barendt, ‘Balancing Freedom of Expression and the Right to Reputation: Reflections on *Reynolds* and Reportage’ (2012) 63(1) *Northern Ireland Legal Quarterly* 59, 61.

²⁵⁰ Case 7 [19] (emphasis added).

²⁵¹ Case 34 [15].

²⁵² *Ibid*, [182].

The conflation of falsity and public interest in *Law Society* is unfortunate – the *Reynolds* defence was, after all, designed to protect the publication of statements not proven to be true²⁵³ – but this kind of confusion may well be solved by the simplified public interest defence in section 4 of the 2013 Act, which requires that:

- (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
- (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

Although significant problems with the section have been identified,²⁵⁴ the clear separation of the two limbs of the defence will likely have the effect of preventing issues relating to falsity or to the circumstances of publication entering into the court's decision on whether the statement was 'on a matter of public interest'. Applying this test, it is difficult to see how the allegations made in the Kordowski cases would not have passed the first hurdle (although they would have failed at the second).

Eric Descheemaeker has argued that the *Reynolds* defence 'represents the importation of what is in essence a negligence standard' into defamation law.²⁵⁵ The limited information available from this study suggests that, when it comes to corporate claimants, this fault standard will almost always apply – albeit that the onus will be on the defendant to prove that publication was not unreasonable.

²⁵³ Paul Mitchell, 'The Nature of Responsible Journalism' (2011) 3(1) *Journal of Media Law* 19, 27; Jonathan Coad, 'Reynolds and Public Interest – What about Truth and Human Rights?' (2007) 18(3) *Entertainment Law Review* 75.

²⁵⁴ Eric Descheemaeker, 'Three Errors in the Defamation Act 2013' (2015) 6(1) *Journal of European Tort Law* 24, 36-40.

²⁵⁵ *Ibid*, 35.

Conclusion

When this research was started, it was hoped that some of the many assertions and arguments made about corporate defamation claimants during the debates that led to the Defamation Act 2013 could be tested. It was also hoped that, by looking in more detail at the landscape of litigation to which the 2013 Act was a reaction, it would be possible to assess the ‘serious financial loss’ requirement in section 1(2) from a fresh perspective.

The findings, on balance, lend some degree of support to those who called for the complete removal of the corporate right to sue. The proportion of claims criticised in some way by the courts, and the number that were declared abusive, is surprising and concerning. The section 1(2) requirement may make some difference, by allowing the courts to strike out weaker claims, but it will not solve all of the problems with corporate defamation claims. Moreover, the restriction of the scope of that requirement to for-profit companies is unjustified in principle, and seemingly ignores the potential for non-profit organisations to abuse defamation laws in order to stifle freedom of speech.

Many of the claimants that were ultimately successful (even bearing in mind that some genuine claimants achieve ‘success’ through settlements without ever making it into a court room) could have relied on an alternative cause of action, or achieved vindication through a related claim brought by a human. Despite the flaws in the argument that companies usually have means of obtaining vindication other than a libel suit, it does appear to reflect the reality of those corporate defamation claims that are heard by the courts. When one considers this evidence in light of existing research on the chilling effect that corporate defamation laws have on expression, it seems difficult to justify the continued existence of the corporate right to sue.

Appendix: Case list

1. *Adelson v Anderson* [2011] EWHC 2497 (QB).
2. *Adelson v Associated Newspapers Ltd*: (a) [2007] EWHC 997 (QB); (b) [2007] EWHC 3028 (QB); (c) [2007] EWCA Civ 701; (d) [2008] EWHC 278 (QB).
3. *Andrew James Enforcement Ltd v ITV Plc* [2012] EWHC 3503 (QB).
4. *Applause Store Productions Ltd v Raphael*: (a) [2008] EWHC 1781 (QB); (b) [2008] EWHC 2263 (QB).
5. *Ascension Securities Ltd v Motley Fool Ltd* [2005] EWHC 3064 (Ch).
6. *Atlantis World Group of Companies NV v Gruppo Editoriale L'Espresso SpA* [2008] EWHC 1323 (QB).
7. *Awdry Bailey and Douglas v Kordowski* [2011] EWHC 785 (QB).
8. *Beach Developments Ltd v Foskett* [2011] EWHC 198 (QB).
9. *Boehringer Ingelheim Ltd v Vetplus Ltd*: (a) [2007] EWHC 972 (Ch); (b) [2007] EWCA Civ 583.
10. *British Chiropractic Association v Singh*: (a) [2009] EWHC 1101 (QB); (b) [2010] EWCA Civ 350.
11. *Citation Plc v Ellis Whittam Ltd*: (a) [2012] EWHC 549 (QB); (b) [2012] EWHC 764 (QB); (c) [2013] EWCA Civ 155.
12. *Club La Costa (UK) Plc v Gebhard* [2008] EWHC 2552 (QB).
13. *Collins Stewart Ltd v Financial Times Ltd*: (a) [2004] EWHC 2337 (QB); (b) [2005] EWHC 262 (QB).
14. *Cooper v Turrell* [2011] EWHC 3269 (QB).
15. *Coys Ltd v Autocherish Ltd* [2004] EWHC 1334 (QB).
16. *Creative Resins International Ltd v Glasslam Europe Ltd*: (a) [2005] EWHC 777 (QB); (b) [2006] EWHC 182 (QB); (c) [2006] EWHC 3159 (QB).

17. *Culla Park Ltd v Richards*: (a) [2007] EWHC 1687 (QB); (b) [2007] EWHC 1850 (QB).
18. *Dar Al Arkan Real Estate Developing Co v Al Refai*: (a) [2012] EWHC 3539 (Comm); (b) [2013] EWHC 1630 (Comm); (c) [2014] EWCA Civ 749; (d) [2015] EWHC 1793 (Comm).
19. *Dorset Flint & Stone Blocks Ltd v Moir* [2004] EWHC 2173 (QB).
20. *Downtex Plc v Flatley*: (a) [2003] EWCA Civ 1282; (b) [2004] EWHC 333 (QB).
21. *Duke v University of Salford* [2013] EWHC 196 (QB).
22. *Ernst & Young LLP v Coomber* [2010] EWHC 2837 (QB).
23. *Euromoney Institutional Investor Plc v Aviation News Ltd* [2013] EWHC 1505 (QB).
24. *Gentoo Group Ltd v Hanratty*: (a) [2008] EWHC 627 (QB); (b) [2008] EWHC 2328 (QB).
25. *Hallam Estates Ltd v Baker*: (a) [2012] EWHC 1046 (QB); (b) [2013] EWHC 2668 (QB); (c) [2014] EWCA Civ 661.
26. *Hayden v Charlton*: (a) [2010] EWHC 3144 (QB); (b) [2011] EWCA Civ 791.
27. *Hays Plc v Hartley* [2010] EWHC 1068 (QB).
28. *Howe & Co v Burden* [2004] EWHC 196 (QB).
29. *Islam Expo Ltd v Spectator (1828) Ltd* [2010] EWHC 2011 (QB).
30. *Jameel v Times Newspapers Ltd*: (a) [2003] EWHC 2609 (QB); (b) [2004] EWCA Civ 983.
31. *Jameel v Wall Street Journal Europe SPRL*: (a) [2003] EWHC 2322 (QB); (b) [2003] EWHC 2945 (QB); (c) [2003] EWCA Civ 1694; (d) [2004] EWHC 37 (QB); (e) [2004] EWHC 38 (QB); (f) [2005] EWCA Civ 74; (g) [2006] UKHL 44.
32. *Jeeg Global Ltd v Hare* [2012] EWHC 773 (QB).
33. *Jon Richard Ltd v Gornall* [2013] EWHC 1357 (QB).
34. *Law Society v Kordowski* [2011] EWHC 3185 (QB).
35. *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB).
36. *Loughton Contracts Plc v Dun & Bradstreet Ltd* [2006] EWHC 1224 (QB).
37. *Mama Group Ltd v Sinclair* [2013] EWHC 2374 (QB).

38. *Marathon Mutual Ltd v Waters* [2009] EWHC 1931 (QB).
39. *McGrath v Dawkins* [2012] Info TLR 72 (QB).
40. *Metropolitan International Schools Ltd v Designtecnica Corp*: (a) [2009] EWHC 1765 (QB); (b) [2010] EWHC 2411 (QB).
41. *Modi v Clarke*: (a) [2011] EWHC 1324 (QB); (b) [2011] EWCA Civ 937.
42. *Norbrook Laboratories Ltd v Vetplus Ltd* [2013] EWHC 4032 (QB).
43. *North London Central Mosque Trust (A Charity) v Policy Exchange* [2009] EWHC 3311 (QB).
44. *Ontulmus v Collett*: (a) [2013] EWHC 980 (QB); (b) [2014] EWHC 294 (QB); (c) [2014] EWHC 4117 (QB).
45. *Pritchard Englefield v Steinberg*: (a) [2005] EWCA Civ 288; (b) [2005] EWCA Civ 824; (c) [2011] EWHC 48 (QB).
46. *Robins v Kordowski*: (a) [2011] EWHC 981 (QB); (b) [2011] EWHC 1912 (QB).
47. *SD Marine Ltd v Powell* [2006] EWHC 3095 (QB).
48. *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (QB).
49. *Sunderland Housing Co Ltd v Baines* [2006] EWHC 2359 (QB).
50. *Tesco Stores Ltd v Guardian News & Media Ltd* [2009] EMLR 5.
51. *Tiscali UK Ltd v British Telecommunications Plc* [2008] EWHC 2927 (QB).
52. *Turkot v Oxus Gold Plc* [2006] EWHC 3361 (QB).
53. *UK Learning Academy Ltd v Leeds City Council* [2011] EWCA Civ 1513.
54. *Wallis v Meredith* [2011] EWHC 75 (QB).